Supreme Court, U.S.
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No. 97-1997

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

VIRGINIA M. MARQUES,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the National Bank Act, which allows bank directors to dismiss bank officers "at pleasure," and which Petitioner concedes does not preempt claims brought under Title VII and other federal civil rights statutes, preempts state-law discrimination claims based on conduct prohibited under the federal civil rights statutes.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondent Virginia Marques worked for petitioner Bank of America for 38 years, beginning in 1956, when she was 18 years old. In 1991, she became a Credit Administrator in the Bank's Regional Credit Administration. In 1992, the Bank informed her that she was now a "vice president," although that designation did not change her job title, responsibilities, or salary.

In June 1994, the Bank informed Marques that her job was being eliminated because her office was relocating from Rancho Cordova to Fremont, California, approximately 100 miles away. The Bank told her that she could apply for comparable positions during a 60-day period, at the end of which her job would terminate. When her office relocated to Fremont, the Bank gave her position to a younger, less-experienced white male from the Rancho Cordova office. Marques applied for other positions, for which she was qualified, and informed the Bank that she was willing to move. Nonetheless, the Bank did not consider her for any of the other positions. Marques, who is Hispanic, was then 57 years old.

Marques brought this action in California state court. She alleged causes of action for unlawful discrimination based on age, sex, and national origin under California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900, *et seq.*; for violation of the California's Equal Pay Act, Cal. Lab. Code § 1197.5; for wrongful termination in violation of public policy, FEHA; Cal. Unemp. Ins. Code § 2070, *et seq.*; for breach of contract, and for breach of the covenant of good faith and fair dealing. Petitioner's Appendix 2a ("Appendix"). The Bank moved for summary judgment, arguing that section 24

(Fifth) of the National Bank Act, 12 U.S.C. § 24 (Fifth), which allows bank directors to dismiss bank "officers" "at pleasure," preempted Marques' state-law claims. The trial court granted the motion in its entirety. Appendix 12a-15a. The appellate court reversed as to the state discrimination-based claims and remanded the case to the trial court for further proceedings. Appendix 11a. The California Supreme Court denied the Bank's petition for review. Appendix 16a. Trial has since been set for December 7, 1998.

REASONS FOR DENYING THE WRIT

Review is unwarranted for three reasons. First, a proper jurisdictional basis is lacking because the state court decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257. *Jefferson v. City of Tarrant*, __ U.S. __, 118 S. Ct. 481 (1997). Second, there is no conflict among the federal circuit courts or state high courts of last resort regarding the question presented here. Third, the decision below is correct.

A. This Court Lacks Jurisdiction To Review The Non-final Decision Below.

"This case, still sub judice in [California], was brought to this Court too soon." *Jefferson v. City of Tarrant*, 118 S. Ct. at 484. This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the California Court of Appeal reverses the trial court's grant of summary judgment and remands the case for further proceedings. Appendix 11a. Thus, the decision below does not qualify as a "final judgment" within the meaning of section 1257.

This Court has identified four categories of cases that constitute exceptions to § 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 118 S. Ct. at 486. As to these three categories, the judgment involved here does not even arguably apply. If Petitioner prevails on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. 118 S. Ct. at 484. On the other hand, if Petitioner does not prevail on remand, it "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.*

The fourth exception has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

This category is also inapplicable here. Petitioner seeks review of a decision of an intermediate-level state court, not of the state's highest court. Although the California Supreme

Court denied review of the *non-final* order below, Appendix 16a, it could accept review of the case when presented in a petition for review from a *final* judgment. *See also Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1104 (1991) (California Supreme Court recognizing issue as "important and difficult question" but not necessary to decide in that case). Moreover, allowing this case to proceed to final judgment, rather than immediately reviewing the decision below, does not risk "seriously erod[ing]" any federal policy. *Cf. Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (allowing adjudication of dispute where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (allowing case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts); *Cox Broadcasting*, 420 U.S. at 485-87 (delaying review would leave important question regarding freedom of press in "uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press"). Therefore, this case does not satisfy the requirements of the fourth exception.

Accordingly, "[t]his case fits within no exceptional category." *Jefferson v. City of Tarrant*, 118 S. Ct. at 487. "Because the [state court system] has not yet rendered a final judgment, [this Court] lack[s] jurisdiction to review" the decision below. *Id.*

B. No Conflict Exists Among Any Federal Circuit Courts Or State High Courts On The Question Presented.

No federal circuit court has decided the question of whether section 24 (Fifth) of the National Bank Act preempts state-law discrimination claims. No federal circuit has decided

the question of whether the comparable provision of the Federal Home Loan Bank Act preempts state-law discrimination claims.[1] And only one federal circuit has decided the question of whether the comparable provision of the Federal Reserve Act preempts state-law discrimination claims. *See Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (dismissal at pleasure provision of Federal Reserve Act preempts state statutory discriminatory discharge claim). No state high court has decided the question in regard to any of the three statutes. *See* Petition at 14 nn.15-16. Accordingly, there is no conflict warranting this Court's review.

C. The Decision Below Is Correct.

Petitioner has conceded that section 24 (Fifth) of the National Bank Act does not preempt discrimination claims brought under Title VII, 42 U.S.C. 2000e, *et seq.*, and other federal civil rights laws. Petition at 5-6, 11. As the court below noted, Appendix 6a, California's FEHA and Title VII have identical objectives. *See California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 283 (1987); *Mixon v. Fair Employment & Housing Comm'n*, 192 Cal. App. 3d 1306, 1316 (1987); *see also Kremer v. Chemical Construction Corp.*, 461 U.S. 462, 277 (1982) ("state fair employment practice laws are explicitly made part of the Title VII enforcement scheme"). In addition, their "procedures and remedies" are "wholly integrated and related." *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1325-26 (9th Cir. 1987). Thus, the court below correctly held that, as to the subjects of discrimination addressed by federal

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[1] *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983), cited by Petitioner (at 14 n.15), is inapposite because it did not involve state-law discrimination claims.

and state anti-discrimination laws, the enactment of the federal laws "effectively vitiated" any conflict between state anti-discrimination laws and section 24 (Fifth). Appendix 9a.

Moreover, Petitioner's contention that allowing FEHA claims to go forward impairs a statutorily protected interest in the autonomy of national banks and in the uniformity of standards applied to them is unsupported by statute or case law. Neither Congress nor this Court has afforded national banks the uniform and predictable standards Petitioner seeks here. In fact, this Court has recognized that national banks are subject to state regulation where, as here, "doing so does not prevent or significantly interfere with the bank's exercise of its powers." *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996) (citing cases).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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